

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1425

77-1425

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Respondent-Appellee,

-against-

MICHAEL J. CAPANEGRO,

Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND
HEARING EN BANC

HENRY PUTZEL, III
Attorney for Defendant-Appellant
MICHAEL J. CAPANEGRO
140 West 62nd Street
New York, New York 10023
212/956-7144

Dated: New York, New York
May 30, 1978

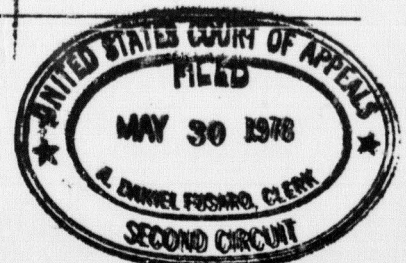


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No. 77-1425

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Petitioner-Appellant.

PETITION FOR REHEARING AND
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Petition

Defendant-appellant Michael J. Capanegro respectfully petitions this Court pursuant to Rule 40(a), F.R.A.P. for a rehearing or, in the alternative, a hearing en banc of its Decision and Opinion of May 15th, 1978, sl.op. at 3037, affirming by a split decision a judgment of conviction entered in the United States District Court for the Southern District of New York.

Grounds for Rehearing

The grounds upon which petitioner relies for this petition are as follows:

1. As pointed out in the dissenting opinion of Judge

Friendly, sl.op. at 3049 et seq., the majority improperly broadened the reach of 29 U.S.C. §501(c) - the statute under which petitioner was convicted - by construing the statute to govern the conduct of independent contractors who supply services to labor unions but are not its employees. In so doing, the majority interpreted the statute in a manner inconsistent with previous cases in this Circuit. Finally, such interpretation raises significant constitutional issues which should, at least, be given en banc consideration.

Brief in Support of Petition

The majority opinion improperly interpreted 29 U.S.C. §501(c) to govern the conduct of an attorney who was not the employee of a labor union but who merely performed legal services to its individual members as an independent contractor.

The defendant was convicted, as a principal, of violating 29 U.S.C. §501(c) which provides:

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both."

In each of the seventeen counts of which he stands convicted, the evidence established, without contradiction, that Mr. Capanegro was receiving legal fees for his services as attorney for individual union members.* Accordingly, the majority opinion concedes that ,

*Although the petitioner continues vigorously to contest the adequacy of the government's evidence with respect to his intent in each count, he does not raise such issue in this petition for rehearing and hearing en banc.

the defendant was not the "employee" of the labor union in the common law sense of the word but was, instead, an independent contractor. Indeed, such conclusion is virtually compelled by prior cases which delineate the distinction. See, Logue v. United States, 412 U.S. 521, 527 (1973); Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2nd Cir. 1973) (L. Hand, J.); Avis Rent-a-Car System, Inc. v. United States, 503 F.2d 423, 429 (2nd Cir. 1974). As the dissent cogently demonstrates, the majority errs in its conclusion that §501(c) governs the conduct of such independent contractors. The legislative history of the statute does not support such a broad reading and, indeed, shows that the Congress rejected versions of the same bill which would have expanded the reach of the statute to include "any person," whether or not employed by a labor union. See, slip. op. at 3051-2, n.1.

In contrast to the interpretation of the statute by the majority, it is clear that §501(c) applies only to employees of a labor union and not to a broader class of persons. Neither the plain language of the statute nor its legislative history supports the broad reading given §501(c) by the majority. Such reading is inconsistent with prior opinions of this and other Circuits:

"It was the plain intention of Congress to hold officers and employees strictly responsible as fiduciaries for the union funds entrusted to them." United States v. Silverman, supra. at 113, citing United States v. Harrelson. 233 F.Supp. 869 (E.D. Mich. 1963).

See, also, Colella v. United States, 360 F.2d 792, 799-800 (1st Cir. 1974), cert. denied, 395 U.S. 829 (1966); United States v. Sullivan, 498 F.2d 146 (1st Cir. 1974), cert. denied, 419 U.S. 993

(1974). Moreover, although the majority claims to avoid the issue by finding that the petitioner was "directly" employed by the union, slip. op. at 3043, n.3, it is clear from its opinion that the Court in fact concludes that Mr. Capanegro was "indirectly" employed by the union as an independent contractor, an argument advanced by the government in its brief. Several decisions of this Court, however, have found that the "directly or indirectly" language of §501(c) modifies the embezzlement language of the statute, not the verb "employed." United States v. Robinson, 512 F.2d 491 (2nd Cir. 1975); United States v. Silverman, 430 F.2d 106, 113-14 (2nd Cir. 1970), modified per curiam on other grounds, 439 F.2d 1198, cert. denied, 402 U.S. 953 (1971); United States v. Santiago, 528 F.2d 1130, 1135 (2nd Cir. 1976), cert. denied, 425 U.S. 972 (1976), citing United States v. Vitale, 489 F.2d 1367, 1370 (6th Cir. 1974); United States v. Harrelson, 223 F.Supp. 869, 871 (E.D. Mich. 1963). The petitioner respectfully submits that the majority has in fact interpreted such language in a manner inconsistent with the prior decisions cited above.

The majority's reading of the statute, we submit, will generate far more problems than it will solve. Without quoting the dissent in extenso, slip. op. at 3055-3057, we respectfully submit that the majority's broad reading of the statute afforded the petitioner no notice that it could fairly be applied to him and, thus, violated his rights to due process. Moreover, such interpretation raises any number of problems in interpreting the reach of the statute which this Court should assiduously avoid. We, therefore, submit that this

Court should reconsider the majority's decision herein and, adopting the dissent, should reverse the conviction and dismiss the indictment below.

CONCLUSION

WHEREFORE, for the reasons stated, it is respectfully submitted that the Court should grant the within petition and adopt the dissent as the opinion of the Court. Accordingly, the judgment should be reversed and the indictment should be dismissed.

Respectfully submitted,

HENRY PUTZEL, III
Attorney for Petitioner-Appellant
MICHAEL J. CAPANEGRO
140 West 62nd Street
New York, New York 10023
212/956-7144

Dated: New York, New York
May 30, 1978

UNITED STATES OF AMERICA,

Respondent-Appellee,

-against-

MICHAEL J. CAPANEGRO,

Petitioner-Appellant.

Docket No. 77-1425

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HENRY PUTZEL, III, being duly sworn, deposes and says:

Deponent is not a party to the action, is over eighteen years of age and resides at 140 West 62nd Street, New York, New York 10023.

On May 30th, 1978, deponent served the within Petition for Rehearing and Hearing En Banc upon Don D. Buchwald, Esq., Assistant United States Attorney, attorney for the respondent-appellee in this action, at the United States Attorney's Office, One St. Andrew's Plaza, New York, New York 10007, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

HENRY PUTZEL, III

Sworn to before me this
30th day of May, 1978.

Katharine Ho

KATHERINE HON
Notary Public, State of New York
No. 31-4634011
Qualified in New York County
Commission Expires March 30, 1970

